

2006 WL 6142740 (Miss.Cir.) (Trial Pleading)
Circuit Court of Mississippi.
Lee County

Charlene DUNN, Plaintiff,

v.

John A. MURPHY, Future Benefits, Inc. American Equity Investment Life Insurance Company, National Western Life Insurance Company, Jefferson Pilot Life Insurance Company, and Creative Marketing International Corporation, Defendants.

No. CV05-045 (A)L.
June 12, 2006.

Second Amended Complaint

Respectfully submitted, [W. Howard Gunn](#), Attorney for Plaintiff, [W. Howard Gunn](#), Attorney at Law, 310 South Hickory Street, PO Box 157, Aberdeen MS 39730, Phone: 1/662-369-8533, Fax: 1/662-369-9844, MSB No. 5073.

Comes now the Plaintiff, CHARLENE DUNN, hereinafter called "Plaintiff", and files this her Second Amended Complaint against JOHN A. MURPHY, FUTURE BENEFITS, INC., AMERICAN EQUITY INVESTMENT LIFE INSURANCE COMPANY, NATIONAL WESTERN LIFE INSURANCE COMPANY, JEFFERSON PILOT LIFE INSURANCE COMPANY, and CREATIVE MARKETING INTERNATIONAL CORPORATION CREATIVE MARKETING INTERNATIONAL CORPORATION, hereinafter referred to as "Defendants".

I.

Plaintiff is an adult resident citizen of Lee County, Mississippi.

II.

Defendant, John A. Murphy, is an adult resident citizen of Lowndes County, Mississippi. Defendant, Future Benefits, Inc., is a corporation incorporated under the laws of the State of Mississippi, and is licensed to do business and is doing business in the State of Mississippi. The agent for service of process of said Defendant is John A. Murphy, 605 2nd Avenue North #503, PO Box 8130, Columbus MS 39705-8130. Defendant, American Equity Investment Life Insurance Company is a corporation incorporated under the laws of the State of Iowa. The agent for service of process of said Defendant is Allen J. Sandifer, 3091 W. Northside Drive, Clinton, MS 39056-3011. Defendant, National Western Life Insurance Company is a corporation incorporated under the laws of the State of Colorado. The agent for service of process of said Defendant is C.T. Corp. System of MS, 645 Lakeland East Drive, Suite 101, Flowood MS 39232. Defendant, Jefferson Pilot Life Insurance Company is a corporation incorporated under the laws of the State of New Jersey and said Defendant has appointed the Insurance Commissioner of the State of Mississippi as its lawful agent for service of process. Defendant, Creative Marketing International Corporation (hereinafter referred to as CMI), is an insurance/annuities brokerage house incorporated in the State of Kansas and doing business in the State of Mississippi with a non-resident license. CMI has no agent for service of process and may be served as follows: Ronald Essary, President, Creative Marketing International Corporation, PO Box 25958, Overland Park, Kansas 66225. All actions of Defendants resulting in claims of Plaintiff as alleged herein occurred in Lee County, Mississippi. Plaintiff, on information and belief acquired after Plaintiff filed her Amended Complaint in this case, herein alleges that CMI was a

brokerage house for the sell of insurance and annuity products of Defendants herein, including other companies offering annuity and insurance products for sale.

III.

(A) Beginning on or about August of 1997, and at other times, Defendant, John A. Murphy, an agent, employee and broker of Defendants, Future Benefits, Inc., American Equity Investment Life Insurance Company, National Western Life Insurance Company, Jefferson Pilot Life Insurance Company and CMI, visited Plaintiff, an **elderly** citizen of Lee County, Mississippi, for the purpose of selling Plaintiff various life insurance policies, annuities and other securities. Plaintiff, who was and is unsophisticated and unknowledgeable in investments, relied upon Defendants and their agent and broker, John A. Murphy, in the selection for purchase, sell and all other aspects regarding Plaintiff's life insurance and securities transactions. In reliance thereon, Plaintiff purchased from Defendants several annuities inclusive of the following:

(i) Policy No. 320772 for \$12,114.61 (10/01) - said policy through Amerus Annuity Group National Western

(ii) Policy No. 320775 for \$12,114.61 (10/01) - said policy through Amerus Annuity Group National Western

(iii) Policy No. 10937 for \$50,000.00 through American Equities (10/01)

(iv) Policy Nos. 320774 for \$11,588.42, 320773 for \$11,588.42, 320772 for \$11,588.42, 310709 for \$46,824.46, 320771 for \$11,588.42, 314308 for \$23,865.11, 312585 for \$23,750.69, 312979 for \$23,684.66, and 312220 for \$23,977.53 through National Western.

Nevertheless, on September 5, 2002, less than a year from said purchase, Defendants' agent, broker and employee, John A. Murphy, "churned" such policies by having Plaintiff to withdraw the above referenced policies and transfer funds therein to Western National Policy No. 0101020362 on September 10, 2002.

As aforesaid, Defendants' agent, broker and employee, John A. Murphy, also sold Plaintiff a life insurance policy. At the time of selling said Jefferson Pilot Life Insurance Policy No. 659037814, Defendant, John A. Murphy, informed Plaintiff that the premium of Twelve Thousand Dollars (\$12,000.00) annually for said policy would reduce to Nine Thousand Dollars (\$9,000.00) per year after the third (3rd) year. Said statement was made by Defendant, John A. Murphy, with reckless disregard for the truth. Plaintiff relied upon such material statements and purchased said life insurance policy. Nevertheless, after a seven (7) year time period, said premium has not decreased, but has increased.

In selling annuities to Plaintiff, Defendant, John A. Murphy, informed Plaintiff in reckless disregard for the truth that the said annuities were ten-year annuities with a low surrender charge of 2-5% or less. In fact, Defendant, John A. Murphy, sold Plaintiff non-qualified annuities which taxed withdrawals and paid Defendant, John A. Murphy, higher commissions. Plaintiff was also told that there would be no surrender charge regarding such annuities. In fact, said annuities were 17-year annuities with a high (25%) surrender charge for the first three to seven years, if surrendered. In reasonable reliance upon such statements, Plaintiff purchased said annuities.

As aforesaid, in selling said annuities to Plaintiff, Defendant, John A. Murphy, in reckless disregard for the truth, informed Plaintiff that she would pay no taxes on a ten percent (10%) amount which she could withdraw yearly from such annuities. Plaintiff was also told that she could withdraw her money from said annuities each year without paying any taxes, that she was being sold a tax qualified annuity. In reasonable reliance upon such statements, Plaintiff purchased said annuities.

Plaintiff did not know of the actions of Defendant, John A. Murphy, or Defendant's whereabouts, until on or about March 15, 2005.

IV.

Defendants, by and through their agent and employee, John A. Murphy, induced churning activity on Plaintiff's account as averred to in Paragraph III which was excessive in volume and frequency in light of Plaintiff's investment objectives for the purpose of obtaining commissions. Furthermore, Defendants' recommendations were for insurance and securities not suitable for Plaintiff's stated investment objectives.

V.

Although Plaintiff did not issue Defendants an express power of attorney, Plaintiff, being an unsophisticated investor, routinely followed Defendants' recommendations and so relied upon Defendants that Defendants were placed in *de facto* control over the volume and frequency of trading in Plaintiff's account.

VI.

(A) On or about November 28, 2003, the Defendant, John A. Murphy, while visiting Plaintiff's residence and acting in his capacity as agent for Defendant, Future Benefits, Inc., and as agent and broker of Defendants herein, and in a fiduciary trust relationship with Plaintiff, implored Plaintiff to lend him a sum of Thirty Thousand Dollars (\$30,000.00) with a promise to repay Plaintiff the said loan by no later than January 5, 2004, plus Five Hundred Dollars (\$500.00) as interest for a total sum of Thirty Thousand, Five Hundred Dollars (\$30,500.00). As further inducement for such loan, Defendant tendered to Plaintiff his personal check in the sum of Thirty Thousand, Five Hundred Dollars (\$30,500.00).

(B) In reliance upon Defendant's assertions regarding repayment of the said loan, and her trust and confidence in Defendant, John A. Murphy, Plaintiff made the aforesaid loan to Defendant, John A. Murphy. Prior to the time for deposit of said check, Defendant, John A. Murphy, requested that Plaintiff refrain or delay from depositing same. On each occasion after such extension Defendant, John A. Murphy, requested another extension for deposit. Finally, Defendant, John A. Murphy, requested Plaintiff to allow him to pay off such check in installments of \$5,250.00 per month for six (6) months, any amount in excess of \$30,000.00 being interest, until said loan was paid in full. However, on July 19, 2004, Defendant, John A. Murphy, tendered to Plaintiff a check in the sum of \$5,250.00 which was deposited by Plaintiff, but returned for non-sufficient funds. On October 13, 2004, Defendant, John A. Murphy, tendered Plaintiff a check for \$3,250.00 which was also deposited by Plaintiff but returned for non-sufficient funds. Since the date of January 5, 2004, when the said loan was due and payable in full, and total payment demanded by Plaintiff, Defendant, John A. Murphy, has paid only \$6,000.00

(C) Plaintiff is an **elderly** lady who lives alone and has worked all of her life in order to enjoy her retired life without **financial** worry or stress. As a proximate result of Defendants' actions, Plaintiff has suffered humiliation and embarrassment in relying upon Defendants in her **financial** decisions. Said actions and inactions of Defendants have also caused Plaintiff to suffer from emotional distress, worry and anxiety to such extent that Plaintiff has incurred sleeplessness, loss of appetite and other injuries.

(D) Defendants owed Plaintiff duties as follows:

- (i) Advise Plaintiff in her **financial** and insurance investments within the standard of care exercised in the insurance brokerage and **financial** investment profession or industry
- (ii) Not excessively trade or sell Plaintiff's investment accounts in contradiction to Plaintiff's investment objectives or to her **financial** detriment.
- (iii) Not borrow money from Plaintiff in violation of the fiduciary trust relationship with Plaintiff.

(iv) To abide by the standard of care and practice exercised in the insurance and securities industry in selling insurance and annuities to Plaintiff.

Defendants breached all of the above duties owed to Plaintiff.

VII.

As aforesaid, Defendants, Future Benefits, Inc., American Equity Investment Life Insurance Company, National Western Life Insurance Company, and Jefferson Pilot Life Insurance Company, employed Defendant, John A. Murphy, as an agent and broker in the sale of their insurance and/or annuity products. As such, said Defendants owed a further duty to Plaintiff to:

(A) Properly supervise said Defendant, John A. Murphy, in order to detect, prevent and correct the negligent actions of John A. Murphy as described herein.

(B) Investigate the competence of John A. Murphy prior to retaining him as their said agent and/or broker in the sale of their said products.

(C) Require said John A. Murphy to obtain coverage of errors and omissions and/or other liability insurance for the protection and safeguards of Plaintiff's investments in said Defendants' products as sold by John A. Murphy.

Said Defendants breached their duties owed to Plaintiff as described in Paragraph II through VII herein. Defendants also failed to establish, maintain or diligently enforce a system of supervision to prevent the actions of John A. Murphy as described herein. Said breach of duties proximately caused damages to Plaintiff alleged herein.

VIII.

Defendants, by and through John A. Murphy, obtained control over Plaintiff's account by recklessly misrepresenting their expertise in the market. Defendants having represented to Plaintiff that the activities of selling in Plaintiff's Complaint as averred to in Paragraphs II through VII were necessary and reasonable in order to safeguard and make profitable to Plaintiff accounts placed with Defendants, and by confirming transactions as principal, thereby in a negligent manner concealed commissions on individual transactions.

IX.

Defendants, Future Benefits, Inc., American Equity Investment Life Insurance Company, National Western Life Insurance Company, and Jefferson Pilot Life Insurance Company, are liable jointly and severally with and to the same extent as Defendant, John A. Murphy, to Plaintiff. Defendants, Future Benefits, Inc., American Equity Investment Life Insurance Company, National Western Life Insurance Company, and Jefferson Pilot Life Insurance Company, having control of Defendant, John A. Murphy, as the acts of Defendant, John A. Murphy, alleged herein and all acts of John A. Murphy occurred within the scope of his duty as employee and agent of Defendants, Defendants, Future Benefits, Inc., American Equity Investment Life Insurance Company, National Western Life Insurance Company, and Jefferson Pilot Life Insurance Company, and general principles of agency. Defendants acted with reckless disregard for the interests of Plaintiff as to be tantamount to gross negligence.

X.

As a direct and proximate result of Defendants' excessive trading or churning in Plaintiff's account and negligence in the selling of insurance and annuities to Plaintiff as averred to in Paragraphs II through VII, Plaintiff sustained damages from losses on commissions earned and interest on said accounts, interest paid on Plaintiff margin account, and capital gains taxes paid on improper transactions, a loss in value of Plaintiff's portfolio, and other damages.

XI.

COUNT ONE

Negligence and Gross Negligence

Plaintiff incorporates by reference all allegations contained in Paragraphs II through XII herein. The actions of Defendants as alleged herein constituted negligence and/or gross negligence as Defendants' actions above averred to constituted gross and reckless disregard to the interests of Plaintiff.

COUNT TWO

Breach of Fiduciary Duties

Plaintiff incorporates by reference all allegations contained in Paragraphs II through XII herein. In entering into a contract with Plaintiff as above mentioned and in selling Plaintiff insurance and in selling securities to and trading securities of Plaintiff, a fiduciary relationship was established between Defendants and Plaintiff. A relationship of trust and confidence was created whereby Plaintiff depended upon Defendants to abide by such fiduciary relationship in its dealing with Plaintiff and Defendants owed duties to Plaintiff as alleged in Paragraphs II through XII herein. Defendants used their superior knowledge in the insurance and securities market and violated such relationship and duties as averred to herein, all to the damage of Plaintiff herein.

COUNT THREE

Breach of Covenant of Faith

Plaintiff incorporates by reference all allegations contained in Paragraphs II through XII herein. The Defendants did not fairly or in good faith deal with Plaintiff. The Defendants have superior knowledge in the subject of insurance investments securities and knew that Plaintiff in this action was not experienced or knowledgeable concerning insurance and investments securities. The Defendants breached their covenant of fair dealing and good faith by using techniques to sell Plaintiff insurance and to sell and trade Plaintiff's investments and securities as averred to herein. As a proximate consequence of the Defendants' afore stated breach of their covenant of fair dealing and good faith with Plaintiff, said Plaintiff was caused to suffer the injuries and damages set out herein.

COUNT FOUR

Breach of Contract

Plaintiff incorporates by reference all allegations contained in Paragraphs II through XII herein. The Defendants entered into a contract with Plaintiff to provide advice, consultation and assistance in a competent manner to meet Plaintiff's insurance purchase and investment objectives as promised to Plaintiff where Defendants obligated themselves as set out above. Defendant, John A. Murphy, breached his contract and a promise to repay the loan he made from Plaintiff in the sum of Thirty Thousand Dollars (\$30,000.00). The Defendants breached the aforesaid contract by failing in their obligations as above mentioned and as a proximate consequence the Plaintiff suffered injuries and damages as set out above.

COUNT FIVE

Intentional and/or Negligent Infliction of Mental and Emotional Distress

Plaintiff incorporates by reference all allegations contained in Paragraphs II through VII herein. As a proximate result of Defendants' actions alleged herein including, but not limited to, negligence and/or gross negligence, Plaintiff suffered and continues to suffer from mental and emotional distress, and other damages alleged herein.

COUNT SIX

Twisting

(A) Plaintiff hereby adopts and incorporates by reference all allegations contained in Paragraphs II through VII herein.

(B) The Plaintiff was insured by a policy of life insurance and/or annuities when Defendant, John A. Murphy, came to her residence for the purpose of selling the Plaintiff replacement life insurance policies and/or annuities, and replacing the Plaintiff's existing policy.

(C) The Defendant, John A. Murphy, made false, misleading or incomplete comparisons concerning the aforesaid replacement life insurance policies and/or annuities and the Plaintiff's existing policy. The Defendants violated the laws of the State of Mississippi, which regulate the sale of insurance products and engaged in the act of "twisting". The Plaintiff is the person who would be expected to suffer damages because of the Defendants' wrongful acts and brings this action as a private cause of action for the Defendants' violation of the laws and regulations of the State of Mississippi regarding the replacement of life insurance policies and annuities.

(D) The Defendant, John A. Murphy, represented to the Plaintiff that the replacement life insurance policies and/or annuities were a better deal than her existing coverage and that the replacement policies and/or annuities were primarily an investment, savings, or retirement plan, which contained a death benefit.

(E) The Defendant, John A. Murphy, did not explain the benefits of the Plaintiff's prior policy or policies, but represented that the replacement policies and/or annuities would provide the Plaintiff with a comfortable retirement.

(F) As a result of the said Defendant's false, misleading or incomplete comparisons, the Plaintiff dropped her existing coverage and purchased said replacement policies and/or annuities and has paid the policies and/or annuities premiums.

(G) As a proximate consequence of the said Defendants' violation of the laws of the State of Mississippi, the Plaintiff lost the benefits of her prior coverage and/or annuities and suffered the injuries and damages set out in the general allegations above.

XII.

Defendants are jointly and severally liable to Plaintiff for exemplary or punitive damages in a reasonable amount for Defendants' excessive trading or churning in Plaintiff's account and all other acts of Defendants as alleged in Paragraphs II through XII. Defendants acted with a conscious and gross disregard of Plaintiff's rights, and with full knowledge of the consequences of their conduct and the damage being caused to Plaintiff.

Wherefore, Plaintiff, Charlene Dunn, respectfully prays as follows:

(A) For compensatory damages in an amount to reasonably compensate Plaintiff for damages sustained herein.

(B) For punitive damages in an amount to deter Defendants and other such potential defendants from future similar conduct.

(C) For reasonable attorney's fees and all costs of those proceedings.

(D) For a jury trial.

(E) For all other general and equitable relief as the law and facts may warrant.

Respectfully submitted,

By: <<signature>>

W. HOWARD GUNN

ATTORNEY FOR PLAINTIFF

W. HOWARD GUNN

ATTORNEY AT LAW

310 SOUTH HICKORY STREET

PO BOX 157

ABERDEEN MS 39730

Phone: 1/662-369-8533

Fax: 1/662-369-9844

MSB NO. 5073

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.